



Comptroller General  
of the United States

Washington, D.C. 20548

145880

## Decision

**Matter of:** GfB-Gesellschaft fuer Bautenschutz Alfred  
Boehm GmbH

**File:** B-246144; B-246145

**Date:** February 5, 1992

Reed L. von Maur, Esq., and Michael J. Murphy, Esq., von Maur, Matthews & Partners, for the protester. Maj. Bobby G. Henry, Office of the Judge Advocate General, and Stanley J. Cieslewicz, Esq., U.S. Army Contracting Command, Europe, Department of the Army, for the agency. Sylvia Schatz, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Where bids were submitted in the name of "Alfred Boehm GmbH", but documentation for the preaward survey was submitted in the name of "GfB-Gesellschaft fuer Bautenschutz Alfred Boehm GmbH" (GfB), a corporation which was first registered after bid opening, and record does not show existence of GfB prior to bid opening, the agency properly determined not to make award to GfB since it was an entity different from that which submitted the bid.

### DECISION

GfB-Gesellschaft fuer Bautenschutz Alfred Boehm GmbH (GfB) protests the Department of the Army's refusal to make award to it under invitation for bids (IFB) Nos. DAJA04-91-B-0181 and DAJA04-91-B-0182, for the repair of bathrooms at Army facilities in Kitzingen, Germany. GfB challenges the Army's determination that GfB was not a legal entity in existence as of the bid opening date and therefore was ineligible for award.

We deny the protests.

Six bids were received on the September 23, 1991, bid opening date. The low bids, submitted in the name of "Alfred Boehm GmbH", a Gesellschaft mit beschraenkter Haftung, or limited liability corporation, were signed by Alfred Boehm, its master painter and manager. In the representations and certifications section of the bid, under "Type of Business Organization," the firm indicated in paragraph K10 that the firm "operates as an individual," but

also certified in paragraph K12 that the firm "operates as a partnership." On September 25, 2 days after bid opening, Alfred Boehm filed for registration of the firm "GfB-Gessellschaft fuer Bautenschutz Alfred Boehm GmbH," with the German authorities at the Handelsregisteramt (German Trade Registry). (GfB was not finally entered in the Trade Registry until October 11.) Also on September 25, a notarized shareholders' agreement, or establishment declaration, was executed stating that GfB and Alfred Boehm were jointly and severally liable for all business transactions undertaken on behalf of GfB since July 1.

During a preaward survey, the Army became aware that the bids in question had been submitted in the name of Alfred Boehm GmbH, while the documentation provided on behalf of Alfred Boehm GmbH for the preaward survey was in the name of GfB, which had first been registered after bid opening. The Army determined that GfB was not the entity that submitted the bids and, indeed, was not in existence as of the September 23 bid opening date; it concluded that the bids in the name of Alfred Boehm GmbH did not bind GfB to perform and GfB therefore was ineligible for award. The Army also discovered that Alfred Boehm had worked for 15 years at the firm Andreas Boehm, owned by Alfred Boehm's father, Karl Boehm, which recently had been suspended from government contracting, and that Alfred Boehm GmbH had the same address and fax machine number as the firm Andreas Boehm. The Army therefore concluded that Alfred Boehm GmbH was affiliated with the suspended firm Andreas Boehm, and determined that this affiliation showed that Alfred Boehm GmbH lacked business integrity. In addition, the Army found that Alfred Boehm GmbH lacked the necessary business experience to perform the required work, since the projects listed by Alfred Boehm GmbH as having been performed by it had actually been performed by the firm Andreas Boehm. The Army therefore refused to make award to the protester, and instead made award to the next low, responsible bidders, the firms Versbach and Schmueck. GfB thereupon protested to our Office challenging the rejection of the Alfred Boehm GmbH bids.

GfB argues that it is the entity which submitted the low bids and was therefore entitled to award. According to GfB, it was established to transact business on July 1, 1991, and legally entitled to do so even before its entry in the Trade Registry. The protester maintains that under German law, GfB was a Vorgesellschaft, a provisional corporation, from July 1 until its October 11 entry in the Trade Registry. As for its use of the name "Alfred Boehm GmbH" in the bids, GfB explains that this is merely an acceptable abbreviation for GfB-Gessellschaft fuer Bautenschutz Alfred Boehm GmbH.

As a general rule, a contract may not be awarded to an entity different from that which submitted the bid. Delaware East Wind, Inc., B-221314, Mar. 12, 1986, 86-1 CPD ¶ 246. Otherwise, irresponsible parties could undermine sound competitive bidding procedures by submitting bids that could be avoided or backed up by the real principals as their interests might dictate. D.J. Findley, Inc., B-213310.2, Nov. 30, 1984, 84-2 CPD ¶ 588.

Nothing in the record shows that GfB was the legal entity which submitted the low bids. Although we have recognized that names of the bidding entity need not be exactly the same in all the bid documents so long as it can be established that the differently identified entities are actually the same, see D.J. Findley, Inc., *supra*, here, there was no documentation available at the time of bid opening establishing that GfB and Alfred Boehm GmbH were the same entity. The bids submitted in the name of Alfred Boehm GmbH on September 23 did not contain any direct or indirect references to GfB. Nor is there any indication in the record that the name of Alfred Boehm GmbH had been used by, or interchangeably with, GfB prior to submitting the bids. (The fact that Alfred Boehm GmbH was identified in the bids as three different entities--a corporation, a partnership, and an individual--evidences considerable uncertainty on Alfred Boehm's part as to the legal status of Alfred Boehm GmbH.)

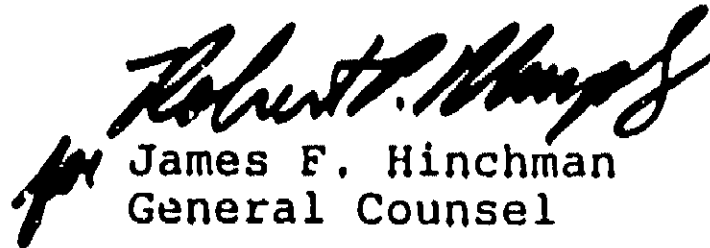
Indeed, there was no contemporaneous evidence that GfB even existed as a legal entity at the time of bid opening. Although GfB argues that its establishment declaration, executed 2 days after bid opening, demonstrates that GfB existed as a provisional corporation since July 1, we agree with the Army that there had to be evidence available as of bid opening establishing that GfB was a legally existing entity on whose behalf Alfred Boehm GmbH submitted the bids. Without evidence available at bid opening of GfB's existence and identity as the bidder, GfB retained the option of subsequently avoiding the government's acceptance of the bids, as by, for example, stating in its establishment declaration (executed after bid opening) that GfB and Alfred Boehm would be jointly and severally liable only for the business transactions undertaken by GfB as a provisional corporation after the September 23 bid opening date. Cf. Precision Constr. Co., B-212194.2, Jan. 16, 1984, 84-1 CPD ¶ 72. Accordingly, we find that the Army properly determined that the bids submitted in the name Alfred Boehm GmbH had not been submitted by, and were not binding offers to perform on the part of, GfB, and that therefore GfB, as an entity different from that submitting the bids, was not entitled to award.

Additionally, we find that the Army reasonably determined Alfred Boehm GmbH, the firm submitting the bids, to be nonresponsible based on its affiliation with the suspended firm Andreas Boehm. The determination of a prospective contractor's responsibility rests principally within the discretion of the contracting officer who, in making that determination, must of necessity rely on his business judgment. Garten-und Landschaftsbau GmbH Frank Mohr, B-237276; B-237277, Feb. 13, 1990, 90-1 CPD ¶ 186. Our Office generally will not disturb a nonresponsibility determination absent a showing of bad faith on the agency's part or that the determination lacked a reasonable basis. Firm Reis GmbH, B-224544; B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72.

A contracting officer's nonresponsibility determination is reasonable where the offeror is affiliated with a debarred bidder. See Atchison Eng'g Co., B-208148.5, Aug. 30, 1983, 83-2 CPD ¶ 278. The Federal Acquisition Regulation § 19.101, provides that a concern may be found to control or have the power to control another concern, and thus be affiliated with that concern, where the concern shares common office space, employees and/or facilities with the other concern, particularly where the concerns are in the same or related industry or field of operation, or where the concerns were formerly affiliated. Here, as noted in the Army's preaward survey, the suspended firm Andreas Boehm and Alfred Boehm GmbH use the same family name, use the same address and fax number, and are in the same line of business. Further, Alfred Boehm, manager of Alfred Boehm GmbH, was employed for 15 years at the firm Andreas Boehm, owned by his father, and terminated his employment there only after the firm Andreas Boehm was suspended from government contracting. As such, we conclude that the Army

reasonably determined on the basis of this evidence that Alfred Boehm GmbH was affiliated with, and would be under the control of, the suspended firm, and therefore was ineligible for award.<sup>1</sup>

The protests are denied.

  
James F. Hinchman  
General Counsel

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<sup>1</sup>The protester argues it was deprived of its due process rights because it was not afforded the opportunity prior to the nonresponsibility determination to rebut the specific allegations made in connection with its responsibility. However, responsibility determinations are administrative in nature and do not require the procedural due process otherwise necessary under judicial proceedings. Accordingly, a contracting agency may base its determination of nonresponsibility on evidence in the record without affording offerors the opportunity to explain or otherwise defend against the evidence, and there is no requirement that offerors be advised of the determination in advance of award. Garten-und Landschaftsbau GmbH Frank Mohr, supra.